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No. 67

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Question presented	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Arnson v. *Murphy*, 109 U. S. 238	5
Barlow-Moore Tobacco Co. v. *United States of America*, certiorari denied, February 1, 1937, No. 576	4, 6
Barney v. *Watson*, 92 U. S. 449	5
Butler v. *Carney*, 17 F. Supp. 133	4
Cary v. *Curtis*, 3 How. 236	5
Collector v. *Hubbard*, 12 Wall. 1	5
Continental Mills. v *United States*, 17 F. Supp. 138, certiorari denied, January 4, 1937, No. 572	4, 6
Cudahy Bros. Co. v. *LaBudde*, decided December 28, 1936 (E. D. Wis.)	4
Curtis's Adm. v. *Fiedler*, 2 Black 461	5
Edwin Cigar Co., Inc. v. *Higgins*, decided December 18, 1936 (S. D. N. Y.)	4
Marshall Field & Co., Inc. v. *United States*, decided December 16, 1936 (Cust. Ct.)	4
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373	5
Old Colony Tr. Co. v. *Commissioner*, 279 U. S. 716	5
Phillips v. *Commissioner*, 283 U. S. 589	5
Priddy & Co., Inc. v. *Early, Jr.*, decided October 29, 1936 (E. D. Va.), pending C. C. A. 4th	4
Schoenfeld v. *Hendricks*, 152 U. S. 691	5
United States v. *Passaeant*, 169 U. S. 16	5
Wilkes-Barre Lace Mfg. Co. v. *Munday*, decided January 28, 1937 (M. D. Pa.)	4

Statutes:

Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, 141:	
Sec. 25	5
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 910 (U. S. C., Sup. II, Title 7, Sec. 652)	5

122456—37

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY, A CORPORATION, PETITIONER

v.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 51–53) is reported in 15 F. Supp. 257. The opinion of the Circuit Court of Appeals (R. 66–78) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered January 8, 1937 (R. 79). The petition for writ of certiorari was filed January 21, 1937. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The applicable provisions of the Revenue Act of 1936, c. 690, 49 Stat. 1648, and the Revised Statutes are printed in the Appendix to the petitioner's brief (pp. 25–38), and are not reprinted herein.

QUESTION PRESENTED

Whether the District Court had jurisdiction to entertain this suit for the recovery of taxes paid under the Agricultural Adjustment Act notwithstanding the provisions of Title VII of the Revenue Act of 1936.

STATEMENT

This action was brought in the United States District Court for the Northern District of Alabama, for recovery of amounts paid as taxes under the provisions of the Agricultural Adjustment Act, c. 25, 48 Stat. 31. The complaint, originally filed November 22, 1935 (R. 1–19), was subsequently amended, on June 12, 1936 (R. 24–34) and on July 3, 1936 (R. 38–42).

The complaint as amended alleges that the taxpayer, an Alabama corporation, paid to the respondent, as Collector of Internal Revenue, processing and floor stock taxes imposed under the Agricultural Adjustment Act in the respective amounts of $257,935.77 and $11,918.28 (R. 1–3, 11–12), for which claims for refund were filed on

June 12, 1935, and rejected by the Commissioner of Internal Revenue on August 16, 1935 (R. 5, 14). Recovery is sought on the sole ground that the Agricultural Adjustment Act, under which these amounts were collected, was unconstitutional.

The Collector moved to dismiss the complaint as amended on the ground that the court was without jurisdiction to entertain the suit, and on the further ground that the complaint failed to state a cause of action against the Collector (R. 19–24, 35–37). The motion to dismiss was overruled by the District Court on the ground that the same question could be reached by demurrer (R. 45, 52). The Collector then demurred to the complaint on the same ground (R. 42–44). Following the enactment of the Revenue Act of 1936, c. 690, 49 Stat. 1648, the Collector's demurrer was amended (R. 46–50). The amended demurrer was based upon the ground that the court was without jurisdiction of the action because of certain provisions contained in Title VII of the 1936 Act, and on the further ground that the complaint failed to state a cause of action against the Collector. The District Court sustained the demurrer on the latter ground and entered judgment for the Collector. On appeal, the Circuit Court of Appeals affirmed the judgment of the District Court upon the ground that there was no jurisdiction in the District Court to entertain the suit (R. 78).

ARGUMENT

The question presented in this case is substantially the same as that presented by the petitions in *Continental Mills* v. *United States*, No. 572, October Term, 1936, certiorari denied, January 4, 1937, and *Barlow-Moore Tobacco Co.* v. *United States of America*, No. 576, October Term, 1936, certiorari denied, February 1, 1937. As indicated by the Government's memorandum in the *Continental Mills* case, the question is important and the decisions of the District Courts are in conflict.[1]

The only difference between this case and the cases of *Continental Mills, supra,* and *Barlow-Moore Tobacco Co., supra,* lies in the fact that the present action was brought against the Col-

[1] In addition to this case, the provisions of the Revenue Act of 1936 here involved have been held to deprive the courts of jurisdiction in *Continental Mills* v. *United States*, 17 F. Supp. 138 (C. Cls.), certiorari denied, January 4, 1937; *Butler* v. *Carney*, 17 F. Supp. 133 (Mass.); *Edwin Cigar Co., Inc.* v. *Higgins* (S. D. N. Y.), decided December 18, 1936, not yet officially reported but found in 1937 CCH, Vol. 3, ¶9013; *Wilkes-Barre Lace Mfg. Co.* v. *Mundy* (M. D. Pa.), decided January 28, 1937, but not yet reported. The same provisions have been held unconstitutional in *Priddy & Co., Inc.* v. *Early, Jr.* (E. D. Va.), decided October 29, 1936, not officially reported but found in 1936 CCH, Vol. 4, ¶9495, now pending before the Circuit Court of Appeals for the Fourth Circuit; *Cudahy Bros. Co.* v. *LaBudde* (E. D. Wis.), decided December 28, 1936; *Marshall Field & Co., Inc.* v. *United States* (Customs Court), decided December 16, 1936, not officially reported but found in 1937 CCH, Vol. 3, ¶9019, petition for rehearing pending.

lector of Internal Revenue to whom the taxes were paid, rather than against the United States. The Government's position on this point, however, is that the action against a Collector of Internal Revenue for the recovery of taxes erroneously or illegally collected is purely statutory and the power of Congress to change or modify that remedy is governed by the same considerations which govern the power of Congress to change or modify a remedy against the United States itself. This position was sustained by the court below and is fully supported by the decisions of this Court. *Cary* v. *Curtis*, 3 How. 236; *Collector* v. *Hubbard*, 12 Wall. 1; *Curtis's Adm.* v. *Fiedler*, 2 Black 461; *Barney* v. *Watson*, 92 U. S. 449; *Arnson* v. *Murphy*, 109 U. S. 238; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373. Section 910 of the Revenue Act of 1936 removing the statutory liability of Collectors of Internal Revenue is no broader than Section 25 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, 141, withdrawing the right to sue Collectors of Customs. The latter provision has been sustained by this Court. *Schoenfeld* v. *Hendricks*, 152 U. S. 691. Cf. *United States* v. *Passavant*, 169 U. S. 16. The substitute remedy provided by Section 906 of the Revenue Act of 1936 satisfies the requirement of due process of law. Cf. *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716; *Phillips* v. *Commissioner*, 283 U. S. 589. However, this matter would

seem immaterial to the question of jurisdiction here presented.

The decision of the court below seems to be plainly correct and the petition presents no consideration in addition to the matters presented in *Continental Mills* v. *United States* and *Barlow-Moore Tobacco Co.* v. *United States of America*, *supra*.

CONCLUSION

The decision of the court below was correct and it would seem that the considerations which led to the denial of the petition for certiorari in *Continental Mills* v. *United States*, *supra*, and *Barlow-Moore Tobacco Co.* v. *United States of America*, *supra*, would be applicable here, and that the present petition accordingly should be denied.

Respectfully submitted.

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